



REPUBLIC OF KENYA

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**IN THE ENVIRONMENT & LAND COURT**

**AT BUSIA**

**ELC NO. 59 OF 2018**

**(FORMERLY BUNGOMA HCC CASE NO. 146 OF 2012)**

ASHON SIKOLIA WANYONYI.....1<sup>ST</sup> PLAINTIFF

PATRICK KISAKA MUNIAFU.....2<sup>ND</sup> PLAINTIFF

LUKA MAKOKHA WANYONYI.....3<sup>RD</sup> PLAINTIFF

AND

BENJAMIN BARASA WAFULA.....1<sup>ST</sup> RESPONDENT

ALFRED MANDU TERA.....2<sup>ND</sup> RESPONDENT

SHAPHAN MASAYI LUVONGA.....3<sup>RD</sup> RESPONDENT

ROSEMARY KHALAYI MWONGOLO.....4<sup>TH</sup> RESPONDENT

JACKSON MAFUNGA WAMUKOTA.....5<sup>TH</sup> RESPONDENT

= VERSUS =

THE NATIONAL CHIEF LAND REGISTRAR & 56 OTHERS.....DEFENDANTS

**R U L I N G**

1. The 1<sup>st</sup> Respondent Benjamin Barasa Wafula moved this court vide the application dated 7<sup>th</sup> May 2020 seeking to be granted the following orders:

1) The application be dispensed with in the first instance due to the utmost urgency hereof.

2) This Honourable Court be pleased and grant orders setting aside the orders issued on 30<sup>th</sup> September, 2019; because the 3<sup>rd</sup> Plaintiff ignored the Court's directions and now he is destroying the suit properties by grazing on the 2<sup>nd</sup> up to 4<sup>th</sup> Applicant's Sugar-Cane Plantations.

3) That, after granting such orders, this Honourable Court be pleased and grant further orders allowing the 2<sup>nd</sup> up to 4<sup>th</sup> Applicant's Sugar-Cane plantations herein, to maintain their canes on L.R. No. Ndivisi/Muchi 1122, 1124, 1125 and 1127 then direct the 3<sup>rd</sup> Plaintiff/Respondent to work on his purported L.R No. Ndivisi/Muchi 1238, pending determination of the entire suit.

4) That, this Honourable Court be pleased and partially grant further orders in terms of the 4<sup>th</sup> and 15<sup>th</sup> prayers of the application dated 5<sup>th</sup> February, 2020; so that the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs herein are estopped from abusing the process of this Case.

## 5) Costs of this Application.

2. The application is supported by the grounds thus;

**a) This Honourable Court issued orders on the 30<sup>th</sup> of September, 2019; which allowed the 3<sup>rd</sup> Plaintiff herein to maintain the Sugarcane in good conditions, pending judgment of the entire case.**

**b) The 3<sup>rd</sup> Plaintiff herein failed to maintain the Sugarcane in good conditions as per the Court Orders issued on 30<sup>th</sup> September, 2019 by this Honourable Court.**

**c) The 3<sup>rd</sup> Plaintiff herein is damaging the sugarcanes by grazing on the Sugar-Cane Plantation, instead of maintaining the Sugarcanes in good conditions pursuant to the Court Orders of 30<sup>th</sup> September, 2019.**

3. The applicant swore an affidavit dated 11/5/2020 in support of the motion wherein he deposed that the 3<sup>rd</sup> plaintiff failed to maintain the sugarcane in good condition as ordered by the Court on 30<sup>th</sup> September 2019. That instead the 3<sup>rd</sup> plaintiff/respondent is damaging the sugarcane by grazing cattle on it. He deposed further that Order 2 rule 4(1) and 5 allows parties to plead any matter which has arisen since the filing of the plaint. That the 2<sup>nd</sup> – 4<sup>th</sup> applicants are the true claimants of their ancestral land Ndivisi/Muchi/1122, 1124, 1125 and 1127 therefore should be allowed to maintain the sugarcane planted thereon while the 3<sup>rd</sup> plaintiff/respondent is only entitled to L.R No. Ndivisi/Muchi/1238 which was previously a slaughter house.

4. The 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs/respondents are indicated to have been personally served on 11<sup>th</sup> June 2020 and also through G4S courier on 26<sup>th</sup> June 2020. The 2<sup>nd</sup> plaintiff is stated to be deceased. The remainder of the 6<sup>th</sup> – 56<sup>th</sup> defendants were served through their advocates on record on 10<sup>th</sup> June 2020. None of the Respondents replied to the application.

5. The Applicants filed their written submissions on 16/7/2020. The submissions however did not address the grounds upon which orders of a court can be varied or set aside. Instead, the applicants submitted on the error committed by the Government of Kenya in transferring the entire parcels of land from the 256 families to be government land No. Ndivisi/Muchi/7996/32 without subdividing the actual acreage or indicating the neighbouring parcels of land. The applicants proceeded to make reference to previous court cases inter alia Eldoret Misc. App. No. 255 of 1995. That the determination of the subdivision cases shall reveal how the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs on 7/11/2012 fraudulently forged the consent in the names of a deceased person to steal the uncompensated portions of Ndivisi/Muchi/1122, 1127, 1308, 1135, 1238 and 1245.

6. It is the applicant's contention that this court erred when on 5/11/2019 it directed parties to proceed with a none existing amended plaint dated 25/9/2018 instead of the one dated 27/6/2019 and filed on 2/7/2019. That the 1<sup>st</sup> plaintiff withdrew from the application dated 5/2/2020 when he realised that the 3<sup>rd</sup> plaintiff was misusing his name. It is submitted that it is in the interest of justice that the 1<sup>st</sup> – 8<sup>th</sup> defendants do investigate the subdivision cases which took place on 23/11/1973 so that they live the government compulsory acquired land from the 256 families' private parcels of land on matters of public interest under order 1 rule 8 of the Civil Procedure Rules Cap 21. That once this is done, it will end the perennial disputes of public nature between the government and the original private proprietors' families.

7. It is settled in law that the court can review, vary and or set aside its orders on account of mistake or error; on discovery of new and important evidence or when there is sufficient cause shown as provided for in section 80 of the Civil Procedure Act and Order 45 of the Rules. The orders made by this Court on 30<sup>th</sup> September 2019 which the applicants are unhappy with read thus; *"Since Mr. Sichangi is not before the court and in light of the confusion of who the 58<sup>th</sup> defendant is; I direct that the applicants do amend their motion within 3 days of today. In the meantime, the respondents are granted orders that both sides do restrain themselves from undertaking any activities on the disputed land. The application shall be heard on 7<sup>th</sup> October, 2019."*

8. From the contents of the above order, the court neither dismissed any of the amended plaints on record nor gave a direction to the 3<sup>rd</sup> plaintiff to tender care sugarcane on the suit parcels of land. In my determination of 5<sup>th</sup> November, 2019, I gave all the plaintiffs (which included the applicants herein) 14 days to file a joint amended plaint after I struck out the amended plaint filed on 3<sup>rd</sup> July 2019 for introducing new parties to the suit without leave of the court. The applicants have not itemised the error or mistake on the face of that ruling. If they were unhappy with this finding, the avenue open to them was to file an appeal and not proceed to urge this Court to sit on appeal on its own decision which the present application is seeking to do.

9. Further the application dated 2/10/2019 was brought by the present applicants. If he is of the opinion that any of the Respondents/Plaintiffs are in contravention and or breach of any of the orders made vide the ruling of 5/11/2019, the proper way to move the court is to file a contempt application. As at now, there is no such contempt application filed therefore annexing photographs of cows grazing on land to the current application for setting aside adds no value with regard to the prayers sought.

10. In conclusion, I find no plausible reasons given to support the granting of the orders sought in the notice of motion application dated 7<sup>th</sup> May 2020. The same does not meet the principles for review, setting aside of orders and or proof of the disobedience complained of. I hereby proceed to dismiss it with no costs since the application was not defended.

**Dated, signed and delivered at BUSIA this 15<sup>th</sup> day of October, 2020.**

**A. OMOLLO**

**JUDGE**